CITATIONS

Cases

	Page
Blau v. United States, 340 U.S. 159 (1950)	7
Boyd v. United States, 116 U.S. 616 (1886)	5
Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963)	9, 11
California v. Byers, 402 U.S. 424 (1971)	6
Couch v. United States, No. 71-889, certiorari granted, April 3, 1972	9
Counselman v. Hitchcock, 142 U.S. 547 (1892)	5
Deck v. United States, 339 F.2d 739 (C.A.D.C. 1964), certiorari denied, 379 U.S. 967 (1965)	11
Donaldson v. United States, 400 U.S. 517 (1971)	4, 10
Friedman, In Re, 104 F. Supp. 419 (S.D.N.Y. 1952)	7
Grant, In Re, 198 F. 708 (S.D.N.Y. 1912)	10
Hincheliff v. Clarke, 371 F.2d 697 (6th Cir. 1967), certiorari denied 387 U.S. 941 (1967)	10
Hoffman v. United States, 341 U.S. 479 (1951)	7
Malloy v. Hogan, 378 U.S. 1, (1964)	7
Marchetti v. United States, 390 U.S. 39 (1968)	6
Murphy v. Waterfront Com'n of New York Harbor, 378 U.S. 52 (1964)	5
Rodgers v. United States, 138 F.2d 992 (6th Cir. 1943)	6
Stuart v. United States, 416 F.2d 459 (5th Cir. 1969)	10
United States v. Blue, 384 U.S. 251 (1966)	9
United States v. Cohen, 388 F.2d 464 (9th Cir. 1967)	8
United States v. Powell, 379 U.S. 48 (1964)	4

	Page
United States v. Sullivan, 274 U.S. 259 (1927)	6
United States v. Vadner, 119 F. Supp. 330 (E.D. Pa. 1954)	7
United States v. Zakutansky, 401 F.2d 68 (7th Cir. 1968), certiorari denied 393 U.S. 1021 (1969)	10

Constitution

Constitution of the United States:	
Fourth Amendment	5, 7, 9
Fifth Amendment	5, 6, 8, 9, 10

Statutes

Internal Revenue Code of 1954 (26 U.S.C.):	
Section 6001	4
Section 6653 (b)	6
Section 7602	4
Section 7605 (b)	4

Regulations

Internal Revenue Code of 1954 (26 U.S.C.):	
Section 1.6001-1 (a)	4
Section 31.6001-1 (b)	4
Section 31.6001-5 (a) (6)-(9)	4

Miscellaneous

1 Davis, Administrative Law, §3.12 (1958)	4
35 Federal Register §2454	7
U.S. Supreme Court Rule 19	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1117

RICHARD J. WIDELSKI and MARY C. WIDELSKI,
Petitioners,

v.

UNITED STATES OF AMERICA AND BRUCE B. MACK, REVENUE AGENT, INTERNAL REVENUE SERVICE,
Respondents.

REPLY BRIEF

STATEMENT OF THE CASE

The Government's recitation of the facts of this case is drawn primarily from the findings of fact of the two lower courts which in turn are drawn primarily from the findings proposed by the Government in the first instance (Pet. 14-17; 23-25; and R. 1-2).[1] It is also significant in this case that the written opinion of the trial court, embodying all of the Government's proposed findings and conclusions with

[1] "R." refers to the record appendix filed in the court of appeals.

certain minor and meaningless changes, was not entered until October 22, 1970—almost four (4) months after the trial court had decided this matter from the bench (R 2, 44, and 103). In light of this rather unusual situation, it is suggested that if this Court is to be aware of all of the relevant facts of this case so as to be truly aware of the situation presented to it, it must refer to and rely upon our Statement of the case.

ARGUMENT

THE BRIEF FOR THE RESPONDENTS IN OPPOSITION FURTHER DEMONSTRATES WHY CERTIORARI SHOULD BE GRANTED IN THIS CASE.

As a prelude to their arguments and in an obvious attempt to prejudice this Court's thinking on our Petition, the Respondents, on page five (5) of their brief, alleged without the benefit of any evidential foundation that copies of the desired tax returns ". . . . were transferred to the taxpayers for the sole purpose of placing them beyond the reach of a continuing tax investigation". Since, in addition to being prejudicial, the statement is erroneous, it must be commented upon at this time.

When the copy of each of the tax returns for the years 1949 through 1959 was returned to its owners the petitioners—taxpayers on February 10, 1968 the only years under investigation were 1963 through 1966 and it was not for another seven (7) to eight (8) months before any agent of the Internal Revenue Service even became interested in the taxpayers' financial affairs for years prior to 1960 (R. 94-95; 68 and 83). Accordingly, the taxpayers would have required occult powers to have known on, and prior to, that date that: (1) a four (4) year investigation

would be expanded some eight (8) months thereafter to an eighteen (18) year investigation, reaching as far back as 1949; (2) the Government would adopt the absurd position that while they had investigated the taxpayers' affairs for years prior to 1960 they lacked the returns for those years and therefore needed the taxpayers' copies, and (3) the Government would serve a summons for those copies fifteen (15) months after they had been returned to the taxpayers (R. 94-95).

While the Respondents' point regarding the taxpayers' motive is patently ridiculous, it is critical to appreciate why it was made. It was made since it is so prejudicial that one is inclined to dismiss all of the important legal questions involved in this case and simply bend the facts and law so as to arrive at a conclusion favorable to the Government. This of course should not occur.

A. The Government's Argument, that it has the Right to Harass Taxpayers, While Untenable, Demonstrates the Need for a Definitive Statement by This Court on the Matter.

In their brief, the Respondents argued that the Government has the right to harass taxpayers. They did so when they declared, on page six (6) of their brief, that: ". . . an order requiring production of a mere copy of the return in this setting seeks no privileged information and offers no opportunity for a fresh assertion of the privilege."

Under such an hypothesis, the fact that all of the desired information was obtained when the original returns were filed with the Government would be of no import. Additionally, while the argument was made in an attempt

to circumvent the privilege against self-incrimination, there are other consequences. For example, it would logically follow that such "production orders" could be entered each day of the year and the taxpayer would have to comply. *Contra,* 26 U.S.C. §7605(b).

Furthermore, the argument overlooks the fact that administrative summonses may not be used to obtain information already within the Government's possession. *United States v. Powell,* 379 U.S. 48, 57-58 (1964) and 26 U.S.C. §7602. In fact, an attempt to secure, through an administrative summons, information already within the Government's possession, would constitute an attempt to abuse the process of the court and would therefore have to be dismissed. *United States v. Powell, supra; Donaldson v. United States,* 400 U.S. 517 (1971) and 1 Davis, Administrative Law, §3.12 (1958). Since in this case, the original returns were filed with the Government, and in light of the absence of a finding or even of any evidence of record that the *original* returns are not still within the Government's possession, it is clear that this latest argument must be rejected.

Furthermore, as summons enforcement cases cannot be used as vehicles to obtain redundant information, such as, copies of filed tax returns, the Respondents' argument that such copies are not covered by the privilege against self-incrimination is moot insofar as this case is concerned. For the same reason, the "required records" portion of their argument is moot. Additionally, it is not even applicable in this case. While 26 U.S.C. §6001 requires the retention of certain records, there is no law which requires taxpayers to file with the Government, or to keep the only documents being sought in this case—copies of Federal income tax *returns.* (R. 6-7) *Cf.* 26 U.S.C. §6001; Reg. §§1.6001-1(a); 31.6001-1 (b); 31.6001-5 (a) (6)-(9). Accordingly, pursuant to the Respondents' logic, the copies are not

quasi-public documents and as such are protected in this setting by the Fourth Amendment, and otherwise, by the Fifth Amendment. *Boyd v. United States,* 116 U.S. 616, 635 (1886).

While the Respondents' argument is moot, it should still be commented on due to the threat it poses to the Fifth Amendment. In making this argument the Respondents on page six (6) of their brief proclaimed that:

> "[i] impliedly, failure to assert the privilege upon the return constitutes a waiver of the privilege with respect to the information reported there, *at least insofar as the information is sought by the government only to establish the taxpayer's income for the relevant years.*"

The italicized portion of the quote is troubling for a multiple of reasons. First, it implies that an argument has been made by us to the effect that the privilege against self-incrimination is applicable in civil cases where there is no threat of criminal prosecution. No such argument has been made. Second, it gives the impression that there is no threat to the taxpayers of federal prosecution which would be based in part upon the desired information. Real threats do in fact exist as even the Court of Appeals recognized. (Pet. 20). Third, it gives the impression that the taxpayers have been granted immunity. Such is not the case and even if it were, the grant of immunity would have to come from all three taxing authorities—the City, State and Federal Governments. *Counselman* v. *Hitchcock,* 142 U.S. 547 (1892) and *Murphy* v. *Waterford Comm'n. of New York Harbor,* 378 U.S. 52 (1964). Only by reviewing this case can the Court remove this latest threat to the ambit of protection afforded by the Fifth Amendment.

B. Despite the Agreement Between the Respondents and the Court of Appeals for the Sixth Circuit that a New and More Restrictive Standard is to be Applied in this Type of Case, the Standard Prescribed by This Court is Still the Law.

Apparently, recognizing the fact that if the normal standard were applied in this case, or possibly as part of its continual assault upon the Fifth Amendment, the Government argued that the standard which has evolved in "failure to file" cases such as *Marchetti* v. *United States*, 390 U.S. 39 (1968); *United States* v. *Sullivan*, 274 U.S. 259 (1927), and *Rodgers v. United States*, 138 F.2d 992 (6th Cir. 1943) or in a "failure to stop and disclose" case such as *California* v. *Byers*, 402 U.S. 424 (1971) should be applied in this case. However, the decisions rendered in those cases have no bearing on the present controversy.

In this matter, there is no statute, regulatory or otherwise, that requires the taxpayers to file copies of tax returns with the Government. Furthermore, the public at large is not involved. Rather, we are in the midst of a tax investigation and it is directed against the two (2) taxpayers in question. Just those few facts alone so distinguish this case from the cited authorities that the rationale of the latter simply cannot be held to be applicable herein.

Nevertheless: since (a) the taxpayers have already been "found guilty" by the Government of income tax evasion;[2] (b) a Special Agent is still involved in this case (R. 77 &

[2] The civil fraud penalty has been asserted by the Internal Revenue Service for the years 1960 through 1966 pursuant to 26 U.S.C. §6653 (b). (Pet. 24).

79);[3] (c) the criminal case was only "dropped" due to certain deficiencies in it at certain points (R. 62, 76, 77, 79 & 84), and (d) there is no reason why it cannot be reopened at any time, we would suggest that even under the "statutory" standard, it is clear that a compelled disclosure in this case would confront the taxpayers with substantial hazards of self-incrimination.

In any event, it would appear to be clear that a compelled disclosure could be injurious in the sense of tending to incriminate the taxpayers in this case and therefore unnecessary under the true standard applicable in cases of this sort. *Malloy* v. *Hogan*, 378 U.S. 1, 13 (1964); *Hoffman* v. *United States*, 341 U.S.479, 486-487, 488 (1951); *Blau* v. *United States*, 340 U.S. 159 (1950); *United States* v. *Vadner*, 119 F. Supp. 330 (E.D. Pa. 1954), and *In Re Friedman*, 104 F. Supp. 419 (S.D.N.Y. 1952). Accordingly, since the new standard employed by the Court of Appeals is not applicable in cases of this type, a conflict exists and should be resolved by this Court. Furthermore, this new standard completely overlooks the fact, as explained on page ten (10) of our Petition, that a compelled production of the copies would result in a violation of the Fourth Amendment.

---

[3] Special Agents are members of the Internal Revenue Service's Intelligence Division which "enforces the criminal statutes . . . by developing information concerning alleged criminal violations thereof . . ." Internal Revenue Service Organization and Functions ¶1118.6, 35 Fed. Reg. 2454.

C. The Conflict in Legal Principle Which Exists, as Recognized by Both Parties to This Controversy, Between the Sixth and Ninth Circuits Should be Resolved by This Court.

While the Respondents erroneously alleged that the decision below is sustainable on other grounds, they did admit that a conflict exists between the decision of the Court of Appeals in this case and with *United States* v. *Cohen*, 388 F.2d 464 (9th Cir. 1967). However, they argued that since the conflict is with a single case there is no reason for review by this Court.

There is of course no requirement for a multiple conflict before certiorari will be granted. U.S. Supreme Court Rule 19. Additionally, as noted in our Petition, there are three other compelling reasons why this case should be reviewed. Furthermore, the conflict in this case is not narrowly confined and is apt to have continuing future consequences. Simply stated, if this conflict is permitted to continue, the basis required in order to claim the Fifth Amendment will be far less in the Ninth than in the Sixth Circuit and accordingly the Constitutional protection afforded those citizens will be uneven. This situation should be corrected immediately and this Court is the only entity which can do so.

D. In Light of This Court's Recent Action, This Case Should be held in Abeyance Temporarily.

As noted by the Respondents on page eight (8) of their brief, this Court on April 3, 1972 granted certiorari in the case of *Couch* v. *United States,* No. 71-889. While the Respondents attempted to distinguish this case from the *Couch* case on a factual basis,[4] their only real achievement was to draw attention to the fact that in both of these cases, there are at least two (2) common propositions in issue. First, possession, and not ownership, is the key to the question of whether desired records are within an individual's privilege against self-incrimination. Second, a compulsory production of an individual's records through an order of a court can breach an individual's rights, from unreasonable searches and seizures, under the Fourth Amendment of the Federal Constitution. In light of those two (2) common issues, it is clear that this case should be held for the disposition of the *Couch* case.

Again, in an attempt to prejudice this Court against the taxpayers, the Government in effect argued that the taxpayers had attempted to increase the ambit of protection afforded by the privilege by acquiring the copies of the returns for 1949 through 1959 during a tax investigation of 1963 through 1966. In point of fact, the taxpayers could have successfully raised their Fourth and Fifth Amendment rights even if the copies had continued in the nominal[5] possession of their bookkeeper since they were al-

---

[4] The fact that the Intelligence Division "dropped" its portion of the Widelski case is meaningless since there is absolutely nothing to prevent it from reactivating its case for the same years or for later years. *See United States* v. *Blue,* 384 U.S. 251 (1966); *Bouschor* v. *United States,* 316 F.2d 451 (8th Cir. 1963), and Pet. 5.

[5] The bookkeeper only had nominal possession since he was to hold the copy of each return for security purposes pursuant to the 1949 contractual, albeit verbal, arrangement entered into by the parties when the bookkeeper was first engaged by the taxpayers (R. 99).

ways in control of the copies. See: *Stuart* v. *United States*, 416 F.2d 459 (5th Cir. 1969); *In Re Grant*, 198 F. 708 (S.D. N.Y. 1912), and *Hinchcliff* v. *Clarke*, 371 F.2d 697 (6th Cir. 1967), certiorari denied, 387 U.S. 941 (1967). Consequently while the Government would have this Court believe that the taxpayers are attempting to enlargen the protection afforded by the Fifth Amendment, the Government is in fact attempting to diminish it.

Furthermore, the Government was in error when it alleged that the taxpayers lacked the proprietary interest so as to have, in the appropriate hypothetical case, the required basis on which to intervene. *See: Donaldson* v. *United States, supra.* In this case, the record clearly establishes that the taxpayers were the actual owners of the copies (R. 99-101). Hence, the proprietary interest requirement would be met in every instance (R. 99-101).

In a further attempt to prejudice our case, the Government was so bold as to allege that the facts of this case were "almost identical" with those of *United States* v. *Zakutansky*, 401 F. 2d 68, 72, (7th Cir. 1968), certiorari denied, 393 U.S. 1021 (1969). The allegation is incredulous since in the *Zakutansky* case: (1) the certified public accountant transferred the papers to the taxpayer only after having been served with two (2) subpoenas for them; (2) when first asked about the papers, the certified public accountant stated that they belonged to him, and (3) the papers sought by the Government pertained to the years then under investigation. None of those critical facts are present in this case.

Contrary to the Government's statement, the facts are so dissimilar in the two (2) cases that we have cited the *Zakutansky* case as authority for the proposition that a sufficient basis, separate and apart from ownership, to

claim that the copies are within the privilege is rightful and indefinite possession. For the same reason, we have also cited the case of *Deck* v. *United States*, 339 F.2d 739 (C.A.D.C. 1964) certiorari denied, 379 U.S. 967 (1965) where state law prescribed that the involved registered public accountant owned the records in question and where he had demanded their return prior to the time summonses had been served.[6]

[6] While the Government also cited the case of *Bouschor* v. *United States*, *supra*, it is not at all applicable in this case since the issue there was whether an attorney had the right to assert the privilege on behalf of his clients.

CONCLUSION

After reviewing the Petition and Briefs, it becomes apparent that the review of this case by this Court will serve a multiple of purposes. First, it will eliminate the conflict which now exists between the Sixth and Ninth Circuits. Second, it will re-establish which standard is applicable in determining whether a claim of the privilege against self-incrimination was justifiable. Third, it will solidify certain of the legal principles put into doubt by the decision of the Sixth Circuit. Fourth, and finally, it will reassert the fact that summons enforcement cases are adversary proceedings which can be of vital importance, and for that reason, must be handled accordingly by the lower courts which must be ever vigilant to protect the rights of the individual citizens.

For those reasons, the petition for a writ of certiorari should be granted.

JOHN J. RAYMOND
JOSEPH F. DILLON
Counsel for Petitioners
1400 Guardian Building
Detroit, Michigan 48226
Telephone: (313) 964-2900

Of Counsel:
RAYMOND, FLETCHER & DILLON
1400 Guardian Building
Detroit, Michigan 48226

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SECTION 6001. NOTICE OF REGULATIONS REQUIRING RECORDS, STATEMENTS, AND SPECIAL RETURNS.

Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe. Whenever in the judgment of the Secretary or his delegate it is necessary, he may require any person, by notice served upon such person or by regulations, to make such returns, render such statements, or keep such records, as the Secretary or his delegate deems sufficient to show whether or not such person is liable for tax under this title.

REGULATION SECTION 1.6001-1. RECORDS.

(a) IN GENERAL. Except as provided in paragraph (b) of this section, any person subject to tax under subtitle A of the Code, or any person required to file a return of information with respect to income, shall keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.

REGULATION SECTION 31.6001-1. RECORDS IN GENERAL.

(b) COPIES OF RETURNS, SCHEDULES, AND STATEMENTS. Every person who is required by the

regulations in this part or by instructions applicable to any form prescribed thereunder, to keep any copy of any return, schedule, statement, or other document, shall keep such copy as a part of his records.

REGULATION SECTION 31.6001-5. ADDITIONAL RECORDS IN CONNECTION WITH COLLECTION OF INCOME TAX AT SOURCE ON WAGES.

(a) Every employer required under section 3402 to deduct and withhold income tax upon the wages of employees shall keep records of all remuneration paid to (including tips reported by) such employees. Such records shall show with respect to each employee—

* * * * *

(6) Copies of any statements furnished by the employee pursuant to paragraph (b)(12) of §31.3401 (a-1) (relating to permanent residents of the Virgin Islands).

(7) Copies of any statements furnished by the employee pursuant to §§31.3401 (a) (6)-1 and 31.3401 (a) (7)-1, relating to nonresident alien individuals.

(8) Copies of any statements furnished by the employee pursuant to §31.3401 (a) (8) (A)-1 (relating to residence or physical presence in a foreign country).

(9) Copies of any statements furnished by the employee pursuant to §31.3401 (a) (8) (C)-1 (relating to citizens resident in Puerto Rico).